No. 89-1939 (3)

In The

Supreme Court of the United States

October Term, 1989

TRI-STATE MOTOR TRANSIT COMPANY,

Petitioner,

vs.

LAURA ATKINSON, PATTY JONES, individually and as surviving spouse of WAYMAN JONES, deceased, and JANELL RENAE JONES,

Respondents.

REPLY OF PETITIONER

BILLY S. SPARKS
Counsel of Record
THOMAS V. BENDER
KIP D. RICHARDS
LINDE THOMSON LANGWORTHY
KOHN & VAN DYKE, P.C.
P. O. Box 26010, 12th & Baltimore
2700 City Center Square
Kansas City, Missouri 64196-6010
(816) 474-6420
(816) 474-3734 (Facsimile)

Attorneys For Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

WHETHER, BY REASON OF THE INTERSTATE COMMERCE COMMISSION REGULATIONS, AN AUTHORIZED INTERSTATE MOTOR CARRIER IS VICARIOUSLY LIABLE, AS A MATTER OF LAW, FOR THE NEGLIGENT OPERATION OF EQUIPMENT LEASED BY THE CARRIER, NOTWITHSTANDING THE USE BEING MADE OF THE EQUIPMENT AT THE TIME THE NEGLIGENT ACT OCCURS.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

LEGISLATIVE MATERIALS:

INTRODUCTION

By their argument, respondents concede that state and federal courts are divided over the question of whether 49 U.S.C. § 11107 and 49 C.F.R. § 1057 were designed to displace the common law doctrine of respondeat superior so as to make interstate motor carriers vicariously liable, as a matter of law, for the negligent use of equipment they lease. Respondents have made no attempt to deny or even refute the fact that the courts have been unevenly interpreting this law and regulation.

Instead, respondents attempt only to explain away the existing conflict by arguing that the confusion over the scope and intended effect of 49 U.S.C. § 11107 and 49 C.F.R. § 1057 was eliminated in 1978 when Congress restated the Interstate Commerce Act. However, the legislative history behind the restatement in no way reflects a congressional intent to alter the law as to carrier liability. Despite the enactment and promulgation of the Revised Interstate Commerce Act in 1978, the courts of this country continue to be divided over the question of whether the federal transportation laws abrogate, modify or incorporate traditional common law notions of respondeat superior with respect to the use of leased equipment by interstate motor carriers.

ARGUMENT IN REPLY

In their response to the petition filed by Tri-State Motor Transit Co. ("Tri-State"), respondents provide only three reasons as to why this Court should deny certiorari. First, respondents argue that the enactment of the Revised Interstate Commerce Act in 1978 reflects a congressional intention to make interstate motor carriers vicariously liable, as a matter of law, for the negligent use of leased equipment. Second, apparently recognizing that state and federal courts have in fact been interpreting 49 U.S.C. § 11107 and 49 C.F.R. § 1057 at variance, respondents argue that this conflict was eliminated in 1978 when the Revised Interstate Commerce Act was promulgated. Third, respondents contend that the opinion of the Oklahoma court of appeals could have been based on an adequate and independent state ground, and that this Court is therefore prohibited from reviewing the case. For the reasons below, each of these arguments is without merit.

I. BY REPEALING 49 U.S.C. § 304(e) AND RE-ENACTING THAT SECTION AS 49 U.S.C. § 11107 IN 1978, CONGRESS DID NOT INTEND TO MAKE INTERSTATE MOTOR CARRIERS VICARIOUSLY LIABLE, AS A MATTER OF LAW, FOR THE NEGLIGENT OPERATION OF LEASED EQUIPMENT, NOTWITHSTANDING THE USE BEING MADE OF THE EQUIPMENT AT THE TIME THE NEGLIGENT ACT OCCURS.

Respondents suggest that the enactment of the Revised Interstate Commerce Act in 1978 reflects a congressional intention to make interstate motor carriers vicariously liable, as a matter of law, for the negligent use of leased equipment. Glaringly absent from respondents' argument, however, is the citation to any authority that supports their interpretative conclusion, let alone to any case that even mentions the 1978 enactment. Equally absent from respondents' argument is any discussion of the legislative history behind the revision. Rather, by comparing the language of 49 U.S.C. § 304(e) (1963) to that of 49 U.S.C. § 11107(a) (1990), respondents tenuously argue that the discrepancies between the two laws *inferentially* substantiate the conclusion that carrier lessees are intended to be vicariously liable as a matter of law. However, neither the legislative history nor the applicable post-1978 case law substantiates this conclusion.

In 1978, Congress enacted the Revised Interstate Commerce Act, Pub. L. No. 95-473, 1978 U.S. Code Cong. & Admin. News (92 Stat.) 1420. In revising the Act, Congress repealed 49 U.S.C. § 304(e) (1963) and reenacted that provision as 49 U.S.C. § 11107 (effective October 17, 1978; amended July 1, 1980). *Id.* The reenactment of section 304(e) as section 11107 was only one part of an expressed congressional effort "to *restate* in comprehensive form, *without substantive change*, the Interstate Commerce Act and related laws, and to enact those laws as subtitle IV of Title 49, United States Code." H.R. Rep. No. 1395, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 3009, 3013 (emphasis added). "In the *restatement*, simple language has been substituted for awkward and obsolete terms, and superseded, executed, and obsolete statutes have been eliminated." *Id.* (emphasis added). Although designated a "revision," the Revised Interstate

Commerce Act merely "restates" the laws related to interstate transportation in one comprehensive title. *See generally id.*

Prior to 1978, section 304(e), in pertinent part, read as follows:

> Subject to the provisions of subsection (f) of this section, the Commission is authorized to prescribe, with respect to the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation of property –
>
> (1) regulations requiring that any such lease, contract, or other arrangement shall be in writing and be signed by the parties thereto, shall specify the period during which it is to be in effect, and shall specify the compensation to be paid by the motor carrier, and requiring that during the entire period of any such lease, contract, or other arrangement a copy thereof shall be carried in each motor vehicle covered thereby; and
>
> (2) such other regulations as may be reasonably necessary in order to assure that *while motor vehicles are being so used* the motor carriers will have full direction and controls of such vehicles and will be fully responsible for the operation thereof in accordance with applicable law and regulations, *as if they were the owners of such vehicles*. . . .

49 U.S.C. § 304(e) (1963) (emphasis added).

In restating section 304(e) so as to read as what is today section 11107(a)[1] (see Petition at 20a-21a), Congress expressly referenced those changes that were anything other than a restatement of the former law by stating:

---

[1] In 1980, Congress amended 49 U.S.C. § 11107 by designating the existing provision as subsection (a) and adding subsection (b). Motor Carrier Act of 1980, Pub. L. No. 96-296, 1980 U.S. Code Cong. & Admin. News (94 Stat.) 809.

> The section *restates* the source provisions for clarity and to reflect the transfer to the Secretary of Transportation of the Commission's functions related to safety operations. The words "Except as provided in section 11101(c) of this title" are substituted for "Subject to the provisions of subsection (f) of this section" to cite the corresponding revised subsection. The word "regulations" is omitted as unnecessary in view of subchapter II of chapter 103 of the revised title. The word "arrangement" is substituted for "leases, contracts, or other arrangements" to eliminate redundancy.

H.R. Rep. No. 1395, *supra* at 3148; (emphasis added). Thus, even though the phrase "while motor vehicles are being so used" was discarded by Congress in reenacting section 304(e), the purpose for which the statute was designed remained the same. Section 11107 merely restates that purpose (*viz.*, to ensure that interstate motor carriers using leased equipment "have control of and be responsible for operating [the equipment] in compliance with . . . applicable law as if [the equipment] were owned by the motor carrier"). 49 U.S.C. § 11107(a)(4); *see Transamerica Fr. Lines v. Brada Miller Fr. Sys.*, 423 U.S. 28, 36 (1975); 49 C.F.R. 1057.12(c)(1).

Despite the fact that section 11107 (today, section 11107(a)) and its companion regulation, 49 C.F.R. § 1057, address only the treatment of the *equipment* leased by an interstate motor carrier and not the *operator* of the equipment, respondents argue (without the aid of any controlling authority) that, by failing to include the phrase "while motor vehicles are being so used" in section 11107, "Congress clarified its intent as to the absolute liability of the carrier lessee." (Response at 11). Respondents' emphasis on the omitted phrase is misplaced.

Clearly, the phrase at issue was disregarded by Congress as redundant or awkward. *See* H.R. Rep. No. 1395, *supra* at 3013. That phrase indicated only that, *for the duration of the lease*, interstate motor carriers were responsible for ensuring that the leased *equipment* complied with "applicable law" to the same extent as if the carrier *owned* the equipment. 49 U.S.C. § 304(e) (1963); H.R. Rep. No. 2425, 84th Cong., 2d

sess., *reprinted in* 1956 U.S. Code Cong. & Admin. News 4304, 4309; *see* generally *id.* This is precisely what section 11107(a) indicates today, as the language of section 304(e) was merely restated in the more recent statute. H.R. Rep. No. 1395, *supra* at 3013, 3148.

Even though an interstate motor carrier using leased equipment is treated as if it owns the equipment under section 11107 and 49 C.F.R. § 1057, the language of the statute and regulation should not be read so as to imply that the *operator* of the equipment is irrefutably presumed to be within the scope of employment every time he or she is operating the equipment (even if the operator is treated as a "statutory employee" of the carrier). *See, e.g., Schell v. Navajo Freight Lines, Inc.*, 693 P.2d 382 (Colo. App. 1984). Neither the language of section 11107(a)(4), nor that of 49 C.F.R. 1057.12(c)(1),[2] nor the legislative history behind either section 304(e) or section 11107, nor any of the applicable case law, substantiates such a conclusion.

Accordingly, respondents' first argument is wholly without support, defies a logical reading of the language of section 11107(a) and is contrary to the legislative history behind the restatement of section 304(e) in 1978. For these reasons, the argument should be disregarded by the Court as a tenuous attempt, at best, to explain away the conflicting interpretation being given by state and federal courts to the federal law in question.

---

[2] In its petition, Tri-State did not expressly raise the issue of whether 49 C.F.R. § 1057 is beyond the scope of authority permitted by 49 U.S.C. § 11107. Rather, Tri-State, in essence, argued that, to the extent the regulation was being interpreted by the courts to impose vicariously liability as a matter of law, such an *interpretation* of the regulation was contrary to the intended effect of the statute. Tri-State believes that interpretation to be in error. If the Court should consider the merits of such an interpretation, Tri-State requests that it be permitted to raise this issue on review if certiorari is granted.

II. THE PROMULGATION OF THE REVISED INTERSTATE COMMERCE ACT DID NOT RESOLVE THE CONFLICT AMONG THE STATE AND FEDERAL COURTS AS TO WHETHER 49 U.S.C. § 11107 AND 49 C.F.R. § 1057 ABROGATE, MODIFY OR INCORPORATE THE COMMON LAW DOCTRINE OF RESPONDEAT SUPERIOR.

In an argument closely connected to their first, respondents suggest that the conflict among state and federal authorities was eliminated in 1978 when the Revised Interstate Commerce Act was promulgated. (Response at 13-14). Again, glaringly absent from respondents' argument is any authority directly substantiating their conclusion.

Because the intended purpose of section 304(e) did not change with the restatement of the Interstate Commerce Act by Congress in 1978, H.R. Rep. No. 1395, *supra*, at 3013, 3148, those cases construing section 304(e) are equally as valid as those construing section 11107. Hence, cases finding that the federal transportation laws do not abrogate the common law doctrine of respondeat superior (e.g., *Gudgel v. Southern Shippers, Inc.*, 387 F.2d 723 (7th Cir. 1967) and *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okla. 1962)) continue to be at variance with more recent cases, even though the former cases construed section 304(e) and were decided prior to 1978.

Significantly, the Tenth Circuit in *Rodriguez v. Ager* (the case on which the Oklahoma court of appeals primarily relied) did not address the promulgation of the Revised Interstate Commerce Act or the restatement of section 304(e) by Congress in 1978, when it concluded that carrier lessees are vicariously liable as a matter of law. Indeed, the Tenth Circuit recognized the existence of conflicting authority and further relied on several pre-1978 cases construing section 304(e) and the prior versions of 49 C.F.R. § 1057.12(c)(1) in making its decision. See 705 F.2d 1229, 1232-36 (10th Cir. 1983). In fact, no post-1978 case on which respondents rely has even addressed the restatement of section 304(e) in reaching its opinion. See *Rediehs Exp. Inc. v. Maple*, 491 N.E.2d 1006 (Ind. App. 1986).

Moreover, contrary to the position advanced by respondents, several post-1978 opinions construing section 11107 have held that the common law doctrine of respondeat superior is not preempted by the federal transportation laws. *See, e.g., Schindele v. Ulrich*, 268 N.W.2d 547 (Minn. banc 1978); *Curtis, Inc. v. Kelley*, 167 Ga. App. 118, 305 S.E.2d 828 (1983).[3]

In *Curtis*, for example, faced with facts closely analogous to those presented by the instant case, the court affirmed a jury's verdict against the driver of a truck leased to an interstate motor carrier, but reversed the verdict against the carrier on the grounds that, at the time of the accident, the driver was acting outside the scope of his employment. 167 Ga. App. 118, 305 S.E.2d at 829-30. In ruling as it did, the court placed no weight on the fact that the driver was the owner of the truck and was leasing the same to the carrier. *Id. Instead, the court analyzed the case as if the driver and carrier had a traditional master-servant relationship. Id.*; *cf. Great West Cas. Co. v. Norris*, 734 F.2d 697 (11th Cir. 1984) (connected case wherein the court affirmed a declaratory ruling that the driver was not covered by the carrier's insurance).

Thus, *Curtis* directly conflicts with *Nationwide Mut. Ins. Co. v. Holbrooks*, 187 Ga. App. 706, 371 S.E.2d 252 (1988) (erroneously designated as a supreme court opinion), a case on which respondents rely in arguing that no conflict presently exists. The existence of cases such as *Schindele* and *Curtis* accentuate the fact that the courts of this country continue to render conflicting opinions with respect to the question presented by Tri-State's petition and further proves

---

[3] Many other post-1978 state appellate court opinions have also held that the federal transportation laws do not abrogate the common law doctrine of respondeat superior. See, e.g., *Wilson v. Riley Whittle, Inc.*, 701 P.2d 575 (Ariz. App. 1984); *Schell v. Navajo Freight Lines, Inc.*, 693 P.2d 382 (Colo. App. 1984); *Grimes v. Nationwide Mut. Ins. Co.*, 705 S.W.2d 926 (Ky. App. 1985); *Reeves v. B & P Motor Lines, Inc.*, 82 N.C. App. 562, 346 S.E.2d 673 (1986); *Midwestern Indem. Co. v. Reliance Ins.*, 44 Ohio App.3d 83, 541 N.E.2d 478 (1988).

the respondents' second argument, like the first, fails to support a denial of certiorari.

III. THE DECISION OF THE OKLAHOMA COURT OF APPEALS IS NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE GROUND THAT WOULD DEFEAT REVIEW BY THIS COURT.

The opinion of which Tri-State presently seeks review was based exclusively on federal law. In affirming the judgment n.o.v. entered by the trial court against Tri-State, the Oklahoma court of appeals (stating it was compelled to follow the Tenth Circuit opinion of *Rodriguez, supra*), determined that "Tri-State would be vicariously liable to third parties for loss of life or injuries from operation of the truck *under ICC regulations*." (Petition at 4a [emphasis added]). In reaching this conclusion, the appellate court ignored the precedent of its own supreme court in *National Trailer Convoy, Inc. v. Saul*, 375 P.2d 922 (Okla. 1962) and relied solely on *Rodriguez*, as well as one foreign state appellate court opinion which, like *Rodriguez*, construed 49 U.S.C. § 11107 and 49 C.F.R. 1057 and imposed liability on the carrier solely by virtue of the regulation.[4]

In the present case, Tri-State's liability under Oklahoma state law was not addressed by the Oklahoma court. To the contrary, the Oklahoma court of appeals, like the trial court below, arrived at its decision by interpreting federal law and found Tri-State to be liable solely by virtue of federal law. Because the decision of the Oklahoma court of appeals was based exclusively on the court's interpretation of federal law and *not* on any "adequate and independent state ground," this Court may properly review that opinion. *See, e.g., Asarco Inc. v. Kadish*, 109 S.Ct. 2037, 2039, 2049 (1989); *United Airlines, Inc. v. Mahin*, 410 U.S. 623, 630-31 (1973).

---

[4] Specifically, this additional case was *McLean Trucking Co. v. Occidental Fire & Cas. Co.*, 72 N.C. App. 285, 324 S.E.2d 633 (1985). (Petition at 4a).

Respondents' argument that the opinion of the Oklahoma court of appeals *could have been* based on adequate and independent state grounds if Boren has been operating a vehicle *owned* by Tri-State must fail. "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground. . . . " *Mahin*, 410 U.S. at 630-31; *see also Michigan v. Long*, 436 U.S. 1032, 1042 (1983). Accordingly, review of this case is proper.

Moreover, even if the Oklahoma court of appeals had assumed that the leased truck was, in fact, to be treated as if it were owned by Tri-State, and the liability of Tri-State had been judged under Oklahoma State law, no liability would have been assessed against Tri-State pursuant to the decision of the Oklahoma supreme court in *Saul, supra*, 375 P.2d 922 (Okla. 1962). In that case, the Oklahoma supreme court stated that a "common carrier who engaged a trucker to operate under [its] I.C.C. permit . . . stands in the same shoes as a master, or employer. . . . Hence, [its] liability is governed by the doctrine of respondeat superior." 375 P.2d at 928.

Under the supreme court precedent of *Saul*, Tri-State would not have been found liable, as the driver of the truck, Elvis Boren, was outside the scope of his employment at the time of the accident giving rise to the lawsuits below. *See Ellis & Lewis, Inc. v. Trimble*, 177 Okla. 5, 57 P.2d 244 (1936) and *Fairmont Creamery Co. of Lawton v. Carsten*, 175 Okla. 592, 55 P.2d 757 (1936), (holding that an employer is not liable for the tortious acts of its employees which occur outside of the scope of employment). Therefore, even under the hypothetical situation proffered by respondents, the Oklahoma court of appeals could not have properly based its decision on an adequate and independent state ground.[5]

---

[5] In addition, contrary to respondents' assertion, Tri-State would not have been found liable as the "bailor" of the truck driven by Boren. Under Oklahoma law, a bailor's liability may not be predicated on a

(Continued on following page)

CONCLUSION

In their response to the Petition for Writ of Certiorari, respondents have failed to provide any justifiable reason as to why this Court should deny certiorari. Rather than showing that the state and federal courts have been rendering consistent opinions with respect to the question presented by the petition, respondents implicitly concede that a conflict among the courts exists. Further, respondents' argument that the opinion of the Oklahoma court of appeals could have been based on adequate and independent state grounds is contrary to the opinion itself and does not justify a denial of review. For these reasons, Tri-State respectfully reiterates its request that this Court grant certiorari and delineate the scope and intended effect of 49 U.S.C. § 11107 and 49 C.F.R. § 1057.

BILLY S. SPARKS
Counsel of Record
THOMAS V. BENDER
KIP D. RICHARDS
LINDE THOMSON LANGWORTHY
KOHN & VAN DYKE, P.C.
P.O. Box. 26010, 12th & Baltimore
2700 City Center Square
Kansas City, Missouri 64196-6010
(816) 474-6420
(816) 474-3734 (Facsimile)

Attorneys for Petitioner

(Continued from previous page)

defect in the vehicle that arises after the bailment. *Lee Eller Ford, Inc. v. Herod*, 353 P.2d 702 (Okla. 1960) (citing *Bush v. Middleton*, 340 P.2d 474 (Okla. 1959)). Here, because the defective condition of Mr. Boren's truck arose after he had completed his final haul for Tri-State and while it was being used by Boren for his personal use, Tri-State would not be liable under Oklahoma law. (Tri-State, however, might have been liable if it had failed to properly inspect the truck before Boren departed for Texas in October of 1985. Such a result would be entirely consistent with the intended effect of 49 U.S.C. § 11107 and 49 C.F.R. § 1057 that the carrier is deemed responsible for use of leased equipment as for equipment it owns. However, there was no such evidence in this case and the jury returned a verdict assessing zero fault against Tri-State).